IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

No. 90-1745

UNITED STATES OF AMERICA,
Petitioner,

v.

RICHARD WILSON,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Richard Wilson, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari, pursuant to Rule 15.1 and Rule 39.5 of the Supreme Court Rules and to proceed in forma pauperis. The Respondent was found to be indigent in the District Court and the Federal Public Defender's Office for the Middle District of Tennessee was appointed under the Criminal Justice Act. 18 U.S.C. §3006A(d)(6). The Respondent proceeded in forma pauperis in the Court of Appeals for the Sixth Circuit and was represented by the Federal Public Defender's Office for the Middle District of Tennessee. Pursuant to Rule 39.1 of the Supreme Court Rules, no affidavit of indigency is required.

Respectfully submitted,

HENRY A. MARTIN
Federal Public Defender

DEBORAH S. SWETTENAM
Assistant Federal Public Defender
Counsel of Record
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

CERTIFICATE OF SERVICE

I, Deborah S. Swettenam, a member of the Bar of this Court, hereby certify that on the 14th day of June, 1991, a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis was mailed, first class postage prepaid, to Joel M. Gershowitz, Attorney, Department of Justice, Washington, DC 20530.

DEBORAH S. SWETTENAM

No. 90-1745

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

United States of America, Petitioner

v.

Richard Wilson, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

HENRY A. MARTIN
Federal Public Defender

DEBORAH S. SWETTENAM
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

QUESTION PRESENTED

Section 3585(b) of Title 18 provides that a defendant shall be given credit toward the service of a term of imprisonment for any period he has spent in official detention before beginning his sentence. Credit is awarded if the detention is attributable to the offense of conviction or to any other offense for which the defendant was arrested after committing the offense of conviction, as long as the period of detention has not been credited against another sentence.

The question presented in this case is whether the computation of credit is to be made by the district court at the time of sentencing or by the Attorney General after the defendant begins to serve his federal sentence.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-1745

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 916 F.2d 1115.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1990. A petition for rehearing was denied on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3585(b) of Title 18, U.S.C., provides:

(b)Credit of prior custody.--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the respondent was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

STATEMENT OF THE CASE

1. Richard Wilson was indicted on December 15, 1988, for conspiracy from August 1, 1988, to September 1, 1988, to affect commerce by robbery of money from the Bank of Putnam County, Monterey, Tennessee in violation of Title 18 U.S.C. 1951. At the time of his indictment Mr. Wilson was in state custody, having been arrested on October 5, 1988. A detainer was placed on Mr. Wilson by federal authorities on December 16, 1988. Mr. Wilson was formally arrested on the indictment on May 15, 1989.

On November 29, 1989, the defendant tendered a guilty plea to the federal charge pursuant to a plea agreement with the government. Under the plea agreement the government recommended that the sentence not exceed 96 months. The court sentenced him to

serve 96 months and denied the respondent's request to be given credit for time he had spent in state custody pursuant to 18 U.S.C. 3585(b)(2).

2. The court of appeals held that the district court should have granted respondent credit against his federal sentence for the period he had spent in state custody. First, the court held that a federal district court has the initial authority and duty to apply the mandate of 18 U.S.C. 3585 at the time the court imposes sentence for a federal offense. Second, the court held that credit for presentence custodial detention served includes time served as a result of a federal and/or state offense if such detention was imposed after the commission of the federal offense for which the defendant is being sentenced and as long as the time served has not been credited to any other sentence, state or federal, at the time sentence is imposed in the case immediately before the court. The government petitioned for rehearing with suggestion for rehearing en banc, but the petition was denied.

REASONS FOR DENYING THE WRIT

This case presents an issue that is not ripe for review by the Supreme Court. The lower courts have not had the opportunity to determine the proper forum for computation of credit decisions. Further, the court of appeal's decision granting credit for time spent in state custody is correct and does not conflict with any opinion of this court. Further review is therefore unwarranted.

1. In 1984, Congress revised section 3568, which was recodified as section 3585(b). Section 3585(b) mandates credit for time in detention for "any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed."[1] Section 3585(b) further states that credit must be awarded for time spent in official detention "prior to the date the sentence commences."[2] Sentences for section 3585(a) purposes commence not on the date of sentencing, but "on the dates the defendant is received in custody" or "arrives voluntarily to commence service" of the sentence at the facility at which it is to be served.[3]

Before Congress enacted section 3585, calculation of a term of imprisonment was governed by 18 U.S.C. 3568 which provided that the Attorney General give any person credit towards service of his sentence for time spent in custody in connection with the offense or acts for which sentence was imposed.[4] Petitioner argues that

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[1]Section 3585(b) of Title 18, U.S.C., provides:
(b) Credit for prior custody.--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--
(1) as a result of the offense for which the sentence was imposed; or
(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
that has not been credited against another sentence.

[2]Id.

[3]Id.

[4]Section 3568 provided as follows:
The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in

the district courts are ill equipped to determine how much time the respondent has served in official detention for which he is eligible to receive credit by the time he begins to serve his federal sentence. Petitioner, however, offers no facts in support of this position. Further, no guesswork on the part of the district court is involved. The statute is clear that a defendant "shall be given credit" for "any time he has spent in official detention...as a result of any other charge."[5] The task of giving credit for time served is clearly not beyond the expertise of the district courts.

2. Petitioner relies on inconsistent analysis of 18 U.S.C. 3585(b) among the circuits as grounds for seeking certiorari. Petitioner, however, fails to produce, much less prove, any problems resulting from the various interpretations. First, petitioner speculates that without further judicial review the Bureau of Prisons faces an "administrative nightmare," in which prisoners within the same facility are subject to different treatment under the sentence credit guidelines. Petitioner fails to identify a single instance of differential treatment or to cite any statistics indicating the scope, or even the existence, of this "nightmare." Further, petitioner does not allege that differences in jail credit computation will be any more troublesome than

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connection with the offenses or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense... which is in violation of an Act of Congress and is triable in any court established by an Act of Congress.

[5]18 U.S.C. 3585(b), emphasis added.

different sentences for similar offenses which have been served within the prison system since the first prison was built and continues until today, federal sentencing guidelines notwithstanding. In the absence of any showing of actual administrative or judicial confusion, or of any unequal treatment of prisoners, this Court should not grant certiorari.

Section 3585(b) makes no designation of authority to the Attorney General to grant credit for time served.[6] Petitioner argues that Congress would not have abandoned "traditional" statutory delegation of responsibility in this area to the Attorney General without doing so explicitly. From 1966-1987 the granting of credit for time served was a purely administrative function. This hardly establishes a "tradition" or "long-standing rule." Prior to 1966 the granting of credit for time served was solely a judicial function and credit was granted at the discretion of the court.[7] Even after 1966, the decision was initially administrative but courts also had authority to grant credit.[8] By not specifically granting the Attorney General the authority to award credit for time served, the authority was once again vested in the courts.

By disregarding the changes between repealed Section 3568 and reenacted section 3585, petitioner ignores a long standing rule of

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[6]The legislative history of Section 3585(b) lacks any statement of congressional intent either to alter or retain the previous administrative authority to compute sentences.

[7]Soyka v. Alldredge, 481 F.2d 303 (3d 1973).

[8]Id., at 305 n.6.

statutory construction. "It is a canon of statutory construction that where . . . the words of a later statute differ from those of a previous one on the same or related subject, the legislature must have intended them to have a different meaning."[9] Congress could have repeated the section 3568 grant of authority to the Attorney General in the reenacted section 3585. It chose not to do so. Petitioner argues that the court should ignore Congress's failure to repeat the language of section 3568 in reenacted section 3585(b). To do so would be to ignore the changes intended by Congress.

Historically, it is assumed that Congress intends what it enacts.[10] Section 3585 falls within Chapter 227 of Title 18, styled "Sentences." The context is one in which trial judges are given authority to calculate the term of a sentence. Logically, if Congress intended the Attorney General to be given the authority for granting credit for time served they would have done so in Chapter 229 of Title 18, entitled Post-Sentence Administration. Chapter 229 is devoid of any such grant of authority.

It must further be presumed, as a canon of statutory interpretation, that "penal statutes should be strictly construed against the government . . . and in favor of the persons on whom

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[9]Klein v. Republic Steel Corp., 435 F.2d 762,765-66 (3d Cir. 1970) (footnote omitted); See also Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989).

[10]United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

the penalties are sought to be imposed."[11] The court below correctly ruled that the statute is not ambiguous. Even if ambiguities were to be found, the historically accepted way of resolving them would be in favor of the sentenced person. Here any alleged ambiguity would be resolved in the manner most favorable to Richard Wilson, namely by conceding to the trial court the mandatory task of awarding sentence credits where they are due.

3. Petitioner asserts facts outside of the record to allege that Mr. Wilson should not have been given the credit toward service of his sentence to which he was clearly entitled under 18 U.S.C. Section 3585(b)(2). In the court of appeals, the government attempted to utilize Rule 10(f) of the Rules of Appellate Procedure to place in the record copies of judgments in state court entered after his sentencing in federal court. Relying on these judgments not properly in the record, petitioner asserts perfunctorily that the subsequent giving of credit for jail time served prior to conviction and sentencing by the state court was incompatible with Section 3585(b)(2)'s prohibition against "double counting." Petitioner alleges that the federal court shortened Wilson's sentence to take account of the same period of detention for which he subsequently received credit from the state.

Petitioner's assertion of a 'windfall' of double credit is completely unsubstantiated by the case record. Mr. Wilson received no benefit from being given credit for his days in custody

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[11]N. Singer, 3 Sutherland Statutory Construction §59.03, at 11, (4th ed. 1984) (citing, e.g., Busic v. United States, 446 U.S. 398 (1980).

against his state sentence. The Tennessee prison authorities have never officially credited Mr. Wilson with the 429 days spent in jail prior to being sentenced in Putnam County, Tennessee, because the authorities were unaware of the sentences. Indeed, the record in this case clearly established that at the time he was sentenced in federal court on November 29, 1989, credit against another sentence had not been given for the time he spent in custody since October 5, 1988. Petitioner, however, now seeks to transform the record to present additional evidence showing that the respondent was sentenced in state court on December 12, 1989, in three cases and granted jail credit of 429 days from October 5, 1988, to December 7, 1989. Respondent objects to such alteration of the record and to consideration of such subsequent facts. Fundamental fairness and due process of law cannot withstand a procedure in which review of a trial court's application of law to facts is circumvented by the admission into the record of additional facts which were not in existence at the time of the trial court's decision.[12]

Moreover, the subsequent giving of credit for Mr. Wilson's jail time was simply a meaningless gesture since his state sentences totally merge with the federal sentence. The state sentence imposed against Mr. Wilson was ordered to run concurrently with the federal sentence. In response to the government's attempt to supplement the record, the respondent in

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[12] See United States v. Allen, 522 F.2d 1229, 1235 (6th Cir. 1975); Sovereign New Co. v. United States, 690 F.2d 569, 571 (6th Cir. 1982).

his reply brief in the court of appeals submitted information by affidavit.[13] As shown by the information contained in the addendum to the reply brief in the court of appeals, under the state sentence with the credit given for 429 days of custody, respondent is eligible for release from the state sentences on April 5, 1993. If he is not given such credit, it can be estimated by adding the 429 days to his April 5, 1993, release date that he would be eligible for release from the state sentences on June 5, 1994. Considering his federal sentence of eight years and assuming his federal sentence commenced on December 12, 1989, when the state sentences were imposed and ordered to run concurrently with his federal sentence, it is obvious that the 429 days in jail prior to sentencing was simply dead time for Mr. Wilson. His federal sentence requires significantly longer imprisonment than his concurrent state sentences, even if credit is not given against his state sentence. Respondent can be expected to remain imprisoned for seven years. This expected time of imprisonment takes into consideration the 54 days of good time which could be granted at the end of each year of time served.[14] Accordingly, assuming commencement of the federal sentence on December 12, 1989, the respondent could expect release from a federal sentence in December of 1996. Even with credit for 429 days, release from the federal

[13]Consistent with its ruling that credit for custody should be initially determined by the district court at the time of sentencing, the court of appeals made no reference either to the government's proposed supplement or to the affidavit appended to respondent's reply brief.

[14]See 18 U.S.C. §3624(b).

sentence would still be no earlier than October of 1995. Comparably, respondent is eligible for release from his state sentences, even without credit for 429 days of jail time, more than one year and four months earlier than his expected release from his federal sentence if given credit against his federal sentence for the 429 days. Without credit for the 429 days, he is imprisoned for more than 2 years and 6 months beyond his state sentences. Clearly, the respondent neither received double credit for time served, nor a "windfall" of any kind. The court's decision below is fair and equitable regarding the grant for credit for time served and should not be disturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Henry A. Martin by DSS

HENRY A. MARTIN
Federal Public Defender

Deborah S. Swettenam

DEBORAH S. SWETTENAM
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047